

July 1, 2004

*Via Electronic Filing*

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: WT Docket No. 02-55  
*Ex Parte Presentation*

Dear Chairman Powell:

As counsel for Nextel Communications, Inc. ("Nextel"), we are writing to respond to recent claims made in the above-referenced proceeding regarding the Anti-Deficiency Act ("ADA") and the Miscellaneous Receipts Act ("MRA"). In a number of *ex parte* filings, Verizon and Verizon Wireless argue that the Consensus Plan, including the assignment of the 1910-1915/1990-1995 MHz band to Nextel, would violate the ADA and MRA.<sup>1</sup>

The Commission should reject this argument for a very fundamental reason: the ADA and MRA, by their plain terms and as consistently construed by the Department of Justice – including by former Assistant Attorneys General Barr, Cooper and Dellinger – only apply to agency conduct directly involving the agency's receipt of and/or expenditure of money. The Consensus Plan will not obligate the Federal Communications Commission ("FCC" or "Commission") to spend money that has not been appropriated by Congress. Nor will the FCC "receive" money by a third party to spend as it sees fit. For these reasons, the ADA and MRA simply do not apply here. These arguments are diversions intended to provide cover to the weaknesses in Verizon's challenge to the Commission's authority to adopt the Consensus Plan under its organic statute.

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<sup>1</sup> Letter from William P. Barr, Verizon, to Chairman Powell (June 28, 2004) ("Verizon June 28 Letter"), attaching a legal memorandum prepared by Charles J. Cooper, Cooper & Kirk ("Verizon Memo"); Letter from Helgi Walker, Counsel to Verizon Wireless, to Marlene Dortch, FCC Secretary (Apr. 8, 2004) ("Verizon April 8 Letter"); Letter from Walter Dellinger and Jonathan Hacker, O'Melveny & Myers LLP, to Chairman Powell (June 30, 2004) ("Verizon June 30 Letter"); Letter from Helgi Walker, Counsel to Verizon Wireless, to Marlene Dortch, FCC Secretary, at 4 (May 27, 2004). (Unless otherwise indicated, all comments and *ex parte* presentations referenced herein were filed in WT Docket No. 02-55).

There is consequently no legitimate basis for Verizon's statement that "accepting Nextel's proposal would place the Commission's members themselves in direct violation of federal budgetary laws governing the accountability of government officials for the disposition of federal property, including laws that carry criminal penalties."<sup>2</sup> Indeed, in the ADA's long history, there has never been a reported case of a criminal conviction under the statute. Verizon's ADA and MRA filings appear to be its latest "scare tactic" – a term recently used by the public safety community to describe other efforts by Verizon and Verizon Wireless to delay and obstruct an effective solution to the serious interference problem plaguing public safety communications in the 800 MHz band.<sup>3</sup>

Verizon baldly argues that, under the ADA and MRA, "[i]t is for Congress, not a given official, to define the legitimate government interests that warrant the expenditure of public funds or the disposition of federal resources."<sup>4</sup> This assertion ignores the broad authority Congress has granted the Commission under the Communications Act of 1934, as amended ("Communications Act"), to regulate the electromagnetic spectrum, including the "disposition of [this] federal resource." Indeed, Section 1 of the Communications Act charges the Commission with the duty to regulate "communication by ... radio ... for the purpose of promoting safety of life and property."<sup>5</sup> In adopting the Consensus Plan and assigning Nextel replacement spectrum in the 1.9 GHz band, the Commission will be using its authority to modify licenses under Section 316 of the Communications Act to advance Section 1's mandate to promote public safety.

Verizon's unfounded interpretation of the ADA and MRA would lead to absurd results. Taken to its logical conclusion, Verizon's argument would mean that the FCC Chairman and Commissioners would be engaging in criminal conduct any time the Commission modified spectrum licenses or permitted licensees to acquire licenses on the condition that they pay the relocation costs of other licensees. The Commission, however, has taken just such actions on numerous occasions. In fact, Verizon Wireless's predecessor companies, along with many other wireless carriers, have acquired PCS spectrum subject to the condition that they pay the relocation costs of incumbent microwave licensees occupying that spectrum.<sup>6</sup> It has become well-established Commission policy to require licensees that

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<sup>2</sup> Verizon Memo at 5.

<sup>3</sup> Letter from Vincent R. Stiles, Association of Public-Safety Communications Officials-International ("APCO"); Chief Ernest Mitchell, International Association of Fire Chiefs ("IAFC"); Chief Joseph M. Polisar, International Association of Chiefs of Police ("IACP"); Chief Harold L. Hurtt, Major Cities Chiefs Association ("MCCA"); Sheriff Wayne V. Gay, National Sheriffs' Association ("NSA"); and Sheriff Margo Frasier, Major County Sheriffs' Association ("MCSA"), to Chairman Michael Powell, FCC, at 2 (June 14, 2004) ("Public Safety June 14 Letter").

<sup>4</sup> Verizon June 28 Letter at 3.

<sup>5</sup> 47 U.S.C. § 151.

<sup>6</sup> See, e.g., Public Notice, "Commercial Mobile Radio Service Information: Announcing the Winning Bidders in the FCC's Auction of 99 Licenses to Provide Broadband PCS in Major Trading Areas," 1995 FCC LEXIS 1692, Att. A (1995), available at:

are assigned spectrum to pay the relocation costs of displaced incumbent licensees. The Commission followed this approach in its mid-1990's orders requiring new upper-200 channel, 800 MHz geographic area-overlay Specialized Mobile Radio ("SMR") licensees to pay for the relocation of affected site-licensed incumbents in that spectrum.<sup>7</sup> Similarly, the FCC has recently required Mobile Satellite Service and advanced wireless licensees to pay the relocation costs of Broadcast Auxiliary Service and Fixed Service licensees in the 2 GHz band.<sup>8</sup> Under Verizon's flawed interpretation of the ADA and MRA, all of these decisions exposed the members of the Commission to "criminal penalties of up to two years in prison or a \$250,000 fine," as described in menacing tones in the Verizon Memo (at 6).

Verizon's proposals in this proceeding contradict its unsupportable interpretation of the ADA and MRA. Verizon Wireless has "urge[d] the Commission to adopt" a proposal made by the Cellular Telecommunications and Internet Association ("CTIA") that the Commission adopt a modified Consensus Plan that would, among other things, assign Nextel replacement spectrum in the 2.1 GHz band rather than the 1.9 GHz band.<sup>9</sup> Verizon Wireless also previously proposed that Nextel, public safety and private wireless licensees engage in a series of license modifications involving the exchange of spectrum channels only within the

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<<http://wireless.fcc.gov/auctions/04/releases/pnw15028.pdf>> (listing Verizon Wireless predecessor companies among the winning bidders); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Fifth Report, 15 FCC Rcd 17660, 17670 (2000) (describing Verizon Wireless' predecessor companies); *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886, ¶ 24 (1992) ("*Redevelopment of Spectrum Order*") (requiring new occupants of spectrum to "guarantee payment of all relocation expenses" incurred by the incumbents). See also *infra*, page 12.

<sup>7</sup> *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, First Report and Order, 11 FCC Rcd 1463 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Second Report and Order, 12 FCC Rcd 19079 (1997); upheld in pertinent part, *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

<sup>8</sup> *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile-Satellite Service*, Third Report and Order and Third Memorandum Opinion and Order, 18 FCC Rcd 23638 (2003). The Commission has most recently adopted an order permitting MMDS and ITFS licensees to exchange channels, and it appears that the MMDS proponent of such exchanges will be required to pay the ITFS licensees' relocation costs in the market in question. "FCC Promotes the Deployment of Wireless Broadband Services by Creating New Rules for the 2495-2690 MHz Band While Protecting Educational Services," News Release, WT Docket No. 03-66, 2004 FCC LEXIS 3075 (June 10, 2004). This decision would also be unlawful according to Verizon's theory.

<sup>9</sup> Letter from R. Michael Senkowski and Helgi Walker, Counsel to Verizon Wireless, to Marlene Dortch, FCC Secretary, at 11 (June 9, 2004).

800 MHz band, with Nextel required to pay the retuning costs of relocating public safety and private wireless incumbents.<sup>10</sup> Both of these band realignment plans would involve modifications to Nextel's licenses pursuant to which it would receive different spectrum assignments in exchange for surrendering spectrum and paying public safety and private wireless relocation costs; presumably Verizon Wireless, in making these proposals, believed they would pass muster under the ADA and MRA. It follows that the assignment of replacement spectrum at 1.9 GHz should also be legal. There is no material difference among these realignment proposals for purposes of these two statutes, further confirming the vapid nature of Verizon's ADA and MRA claims.

Verizon's latest filings are part of a troubling pattern of its self-contradictory proposals and arguments throughout this proceeding.<sup>11</sup> Now Verizon gives the Commission a dissertation on the ADA and MRA, asserting an unprecedented and unsupportable interpretation that these statutes render the Commission powerless to adopt a realignment plan that will allow a third party to fund public safety relocation costs – funds that would under no circumstances be supplementing or replacing any federally funded program. Verizon would have the Commission, in effect, throw up its hands and surrender, notwithstanding its statutory duty to remedy the 800 MHz interference problem.<sup>12</sup> This is no answer to an issue that goes to the heart of the Commission's mandate to regulate the spectrum and promote the public interest. It appears to be yet more “malarkey” from Verizon, to borrow another phrase used by public safety organizations in describing Verizon's tactics in this proceeding.<sup>13</sup>

This letter (1) reiterates the sound statutory basis for the Commission to approve the Consensus Plan; and (2) explains why the Commission should summarily reject Verizon's tortured interpretation of the ADA and MRA.

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<sup>10</sup> Letter from John T. Scott, III, Verizon Wireless, to Marlene H. Dortch, FCC (Feb. 26, 2004).

<sup>11</sup> Supplemental Response of Nextel Communications, Inc., at 6-7 (Apr. 2, 2004) (“Supplemental Response of Nextel”) (summarizing the various Verizon and cellular industry proposals in this proceeding) (April 2, 2004). See also Steven Pearlstein, *Verizon Needs to Duke it Out in the Market*, THE WASHINGTON POST, June 2, 2004, at E01 (describing Verizon's “scorched-earth strategy”: “In the Nextel case, Verizon's argument was that the only fair way to allocate spectrum is through auctions. Funny, that, coming from a company that got its big leg up on the competition by getting its original cellular spectrum for free. Ironically, one of the last times Verizon showed up at a spectrum auction, it bid over \$8.5 billion. That was just before the telecom bubble burst. When it realized it had overpaid, Verizon called in its political chits and persuaded the FCC to pretend it all never happened.”).

<sup>12</sup> Verizon June 28 Letter at 6 (“At the end of the day, I believe that the FCC cannot unilaterally take the steps proposed. This matter belongs in the Congress, which alone can make provision for the proper, adequate, and secure funding for the needs of public safety.”).

<sup>13</sup> Public Safety June 14 Letter at 2.

**A. Verizon Ignores the Commission's Vital Public Interest Obligations and its Plenary Authority to Regulate the Spectrum in the Public Interest**

Verizon presents the issue before the Commission as “the legality of a proposed transaction between the [Commission] and Nextel ... for the sale of federally controlled radio spectrum.”<sup>14</sup> This fundamentally mischaracterizes the issue in this rulemaking and license modification proceeding and strips it of its public interest context. The Consensus Plan does *not* involve the sale of spectrum or a “transaction.” The modification of Nextel’s licenses and the assignment of 1.9 GHz spectrum to Nextel is but one component of a comprehensive plan to remedy the 800 MHz interference problem and provide additional spectrum for public safety communications. Nextel would receive suitable replacement spectrum – the 1.9 GHz band – to make it whole for its substantial and essential contributions to this plan.

The Commission has described its objectives in this proceeding as remedying the public safety interference problem in the 800 MHz band, minimizing disruption to incumbent licensees, and providing additional spectrum for public safety communications.<sup>15</sup> Each of these goals serves a compelling public interest purpose in effectuating the Commission’s mandate under the Communications Act. As Nextel and public safety parties have explained, the Consensus Plan, including assigning the 1.9 GHz spectrum to Nextel, is the only proposal in this proceeding that provides a practical, lawful means for the Commission to further this statutory mandate.

The Commission is *not* required to, nor should it, auction the 1.9 GHz spectrum. As Nextel has explained in detail in prior filings,<sup>16</sup> Section 309(j)’s auction requirement does not apply because the Commission can implement the Consensus Plan by modifying Nextel’s existing licenses under Section 316 of the Communications Act.<sup>17</sup> Rather than granting an

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<sup>14</sup> Verizon Memo at 1.

<sup>15</sup> *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, Notice of Proposed Rulemaking, 17 FCC Rcd 4873, ¶ 2 (2002).

<sup>16</sup> Comments of Nextel Communications, Inc. at 56-64 (May 6, 2002); Reply Comments of Nextel Communications, Inc. at 61-68 (Aug. 7, 2002) (“Nextel August Reply”); Reply Comments of Nextel Communications, Inc. and Nextel Partners Inc., at 19-23 (Feb. 25, 2003); Letter from Regina Keeney, Counsel to Nextel, to Marlene Dortch, FCC Secretary (Dec. 16, 2003).

<sup>17</sup> 47 U.S.C. § 316(a)(1). The Commission takes a number of regulatory actions before it conducts a spectrum auction, including allocating spectrum to a particular use, establishing service rules, and establishing the rules and procedures that will govern the particular auction in question. It also, of course, determines whether it will designate the spectrum as available for “initial” licensing that will be subject to competing applications. The Commission has both discretion and an obligation *not* to designate a particular block of spectrum as such where do so serves the public interest. 47 U.S.C. § 309(j)(6)(E). The Commission also has the statutory power to assign spectrum pursuant to its license modification authority under Section 316, rather than to auction the spectrum.

initial spectrum license subject to Section 309(j)'s auction provision, the Commission's assignment of replacement spectrum to Nextel under the Consensus Plan would simply modify Nextel's *already-existing* licenses.<sup>18</sup> The Commission has full discretion to limit eligibility to this replacement spectrum to Nextel, as long as such limitation promotes the public interest and there is a reasoned explanation for that action.<sup>19</sup> It is beyond dispute that implementation of the Consensus Plan would greatly benefit the public interest by eliminating interference and improving public safety communications.

Verizon's ADA and MRA analysis simply presupposes that Section 309(j)'s auction requirements apply, what the results of that auction would be, and that money is already due under that process. Verizon neglects to mention the Commission's Section 316 license modification authority.<sup>20</sup> Verizon's analysis also ignores or distorts key facts in the record. Verizon suggests that Nextel is the sole cause of CMRS – public safety interference; the record, however, shows that Verizon and other cellular carriers have contributed to up to 25 percent of the interference incidents reported to date.<sup>21</sup> Verizon claims that Nextel has “failed to take the measures necessary to put an end to this interference”; the record, however, shows that Nextel has been operating in full compliance with its licenses and that Nextel (in contrast to the behavior of some other carriers) has made exhaustive Best Practices efforts to mitigate the interference.<sup>22</sup> Verizon claims that the Commission could “simply order Nextel to stop” causing interference; the record, however, shows that the interference problem can only be remedied by addressing the underlying problem through a realignment of the band to separate incompatible public safety and CMRS system designs.<sup>23</sup> Verizon

<sup>18</sup> *Id.* § 309(j)(1) (auction requirement triggered where “mutually exclusive applications are accepted for an initial license”).

<sup>19</sup> See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203-205 (1956); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 439 (D.C. Cir. 1991); *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band*, Report and Order, 17 FCC Rcd 2704, ¶¶ 21-29 (2002) (“MSS Report and Order”) (recognizing that “the Commission is afforded significant latitude when it exercises its Section 316 authority”).

<sup>20</sup> The Verizon June 30 Letter, the most recent Verizon filing asserting its ADA and MRA arguments, fails even to mention the Communications Act, let alone Section 316 and other statutory provisions that grant the Commission expansive power to regulate spectrum.

<sup>21</sup> See Supplemental Response of Nextel at 18-19. The significant role of cellular carriers in CMRS – public safety interference has been confirmed by third-party experts. The cellular contribution to this interference has been documented, for instance, in Anne Arundel County, Maryland, Phoenix, Arizona, and Denver, Colorado. *Ex Parte* Submission of the Consensus Parties, at 17 n.34 (Aug. 7, 2003) (“Consensus Parties August *Ex Parte*”).

<sup>22</sup> See Nextel August Reply at 38-41, 46-48; Letter from Robert S. Foosaner, Senior Vice President and Chief Regulatory Officer, Nextel Communications, Inc., to Marlene Dortch, FCC Secretary, at 14-16 (May 16, 2003); Consensus Parties August *Ex Parte* at 15-18.

<sup>23</sup> Comments of Nextel Communications, Inc., at 20-25 (Sep. 23, 2002); Consensus Parties August *Ex Parte* at 15.

claims Nextel will receive a windfall in being assigned the 1.9 GHz spectrum; the record, however, contains extensive evidence showing that the value of Nextel's contributions are comparable to even Verizon's exaggerated valuation of the 1.9 GHz spectrum.<sup>24</sup>

Verizon's ADA and MRA arguments appear consequently to be based on a distorted view of the record and an incorrect interpretation of the Commission's regulatory power. Verizon's ADA and MRA theories would turn the Commission into little more than a spectrum broker tasked with the responsibility of maximizing auction revenues. This would be directly contrary to the Communication Act's express prohibition against the Commission considering auction revenues in establishing rules governing the assignment of spectrum licenses.<sup>25</sup> It also ignores the Commission's broad authority to regulate the spectrum and promote the public interest under the Communications Act.<sup>26</sup> As can be seen in a 1991 decision by the U.S. Court of Appeals for the D.C. Circuit, this authority enables the Commission to use its spectrum licensing powers to create incentives for third parties to fund particular public interest objectives.

In this case, *Rainbow Broadcasting Co. v. FCC*,<sup>27</sup> the Commission permitted a commercial TV station licensee and noncommercial TV station licensee to exchange channels pursuant to Section 316's license modification process without being subject to competing applications. Under the channel exchange, the commercial station received a channel that reached a larger population and thus was more valuable; in return, the commercial station assigned another channel to the noncommercial station and paid the

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<sup>24</sup> See Dr. Kostas Liopiros, Sun Fire Group LLC, "The Consensus Plan: Promoting the Public Interest – A Valuation Study," attached to Letter from Lawrence R. Krevor, Nextel, to Marlene Dortch, FCC (Nov. 20, 2003) ("Sun Fire Group Study"); "What Windfall? A Review of the Valuation Components of the Consensus Plan," attached to Letter from Regina M. Keeney, Counsel for Nextel, to Marlene Dortch, FCC (Mar. 19, 2004) ("Nextel March 19, 2004 Letter"); "Nextel's Spectral and Financial Support of The Consensus Plan," attached to Letter from Regina M. Keeney, Counsel for Nextel, to Marlene Dortch, FCC Secretary (June 21, 2004).

<sup>25</sup> 47 U.S.C. § 309(j)(7)(A). Chairman Powell has said that "[i]t is important to emphasize (yet again) that good spectrum policy should not be driven by trying to garner the most dollars for the Treasury." *Auction of Licenses in the 747-762 and 777-792 MHz Bands*, Statement of Chairman Michael K. Powell, 17 FCC Rcd 10098, 10103 (2002).

<sup>26</sup> See 47 U.S.C. §§ 151, 303, 307, 309. See also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (stating that "Congress in 1934 acted in a field that was demonstrably 'both new and dynamic,' and it therefore gave the Commission '... expansive powers'") (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943)); *American Radio Relay League, Inc. v. Federal Communications Com.*, 617 F.2d 875, 877 (D.C. Cir. 1980) (stating that "Congress created the Federal Communications Commission and gave that agency broad authority to regulate the use of space on the radio spectrum").

<sup>27</sup> *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991).

noncommercial station nearly \$1.5 million to construct and operate its station on the new channel. The channel the commercial station received had been an unbuilt, reserved noncommercial educational channel that normally would have been available to any interested party to apply for upon being designated for commercial use. The Commission, however, did not accept competing applications in the context of the channel exchange in *Rainbow* because it sought to encourage commercial licensees to enter into channel swaps that resulted in cash payments to noncommercial licensees. The Commission adopted this policy "as a rescue effort for educational broadcasting in the wake of decreases in federal funding."<sup>28</sup>

The D.C. Circuit upheld the Commission's decision, finding that it had the authority to "approve channel exchanges and protect them from competitive bidding" under Sections 309 and 316 of the Communications Act.<sup>29</sup> The court stated that the Commission's policy "was a proper exercise of the FCC authority delegated to it by Congress to further the public interest. Far from being an arbitrary and capricious departure from its delegated authority, the Policy represents an effort by the FCC to promote educational television by making it easier for educational channels to raise cash by trading in on their valuable channel positions."<sup>30</sup>

**B. The Anti-Deficiency Act Does Not Apply to the Consensus Plan**

Not only does Verizon give short shrift to the Commission's powers under the Communications Act, it ignores the plain language of the ADA. The Supreme Court has stated that "the starting point in every case involving construction of a statute is the language itself."<sup>31</sup> The language of the ADA is clear:

An officer or employee of the United States Government ... may not –

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;  
[or]

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.<sup>32</sup>

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<sup>28</sup> *Id.* at 406.

<sup>29</sup> *Id.* at 410.

<sup>30</sup> *Id.*

<sup>31</sup> *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (citation omitted).

<sup>32</sup> 31 U.S.C. §1341(a)(1).

The Act's plain terms do not apply to this proceeding and the exercise of the Commission's rulemaking and spectrum management authority under the Communications Act. As one commentator has observed, "[t]he Anti-Deficiency Act is the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds set by appropriation acts and related statutes."<sup>33</sup> It is part of a body of "fiscal law" that governs the use of appropriate funds by federal agencies.<sup>34</sup> This fiscal law does not restrict the Commission's regulatory power to address the 800 MHz interference problem by adopting the Consensus Plan and providing Nextel sufficient replacement spectrum. While the ADA may govern the Commission's ability to enter into contracts to buy pencils, computers, janitorial services, or a new office building, it does not bar this rulemaking proceeding or the Commission's decision to adopt the Consensus Plan.

Verizon attempts to twist the plain meaning of the ADA beyond recognition. Its April 8 Letter claims that the assignment of 1.9 GHz replacement spectrum to Nextel would be a "private sale at a below-market price, or at a price that is discounted to compensate Nextel for payments to third parties," and that this somehow would be the "functional equivalent" of a contractual payment from the FCC that violates the ADA.<sup>35</sup> Its June 28 filing echoes this line of argument.<sup>36</sup>

Congress' power over the purse and appropriation authority applies to money, not to amorphous concepts such as "functional equivalency." The ADA has been strictly and consistently construed by the Justice Department's Office of Legal Counsel to apply to authorizations or obligations for the payment of money.<sup>37</sup> Not surprisingly, then, Verizon

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<sup>33</sup> Gary Hopkins & Robert Nutt, "The Anti-Deficiency Act and Funding Federal Contracts: An Analysis," 80 Mil. L. Rev. 51, 56 (1978).

<sup>34</sup> Paul Hancq, "Violations of the Antideficiency Act: Is the Army Too Quick to Find Them?," 1995 Army Law. 30 (1995).

<sup>35</sup> Verizon April 8 Letter at 1.

<sup>36</sup> Verizon Memo at 7-8.

<sup>37</sup> See e.g., Opinion of the Office of Legal Counsel, *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 1996 OLC LEXIS 16 (1996) (AAG Dellinger opines that an executive branch agency is not bound by opinions of the Comptroller General regarding a requirement relating to procurement of printing services through the Government Printing Office); Opinion of the Office of Legal Counsel, *Authority to Use Funds from Fiscal Year 1990 Appropriation to Cover Shortfall from Prior Award Year's Pell Grant Program*, 1990 OLC LEXIS 64; 14 Op. O.L.C. 68 (1990) (AAG Barr opines that a lump sum grant appropriated in one year may be used to fund deficiencies in a prior year, consistent with the ADA); Opinion of the Office of Legal Counsel, *Authority to Decline Compensation for Services on the National Counsel of Arts* 1989 OLC LEXIS 12; 13 Op.O.L.C. 135 (1989) (AAG Kmiec opines that the agency's construction of its authority to compensate a member at a "zero" level should be deferred to when considering whether doing so would violate the ADA); Opinion of the Office of Legal Counsel, *Funding of Grants by the National Institutes of Health*, 1986 OLC LEXIS 59; 10 Op.O.L.C. 26 (1986)

cites no precedent to support its attempt to apply the ADA to the Consensus Plan. None of the Comptroller General opinions Verizon cites involves an agency's *rulemaking* authority to implement *regulatory powers* expressly delegated to it by Congress.<sup>38</sup>

Verizon primarily relies on two Comptroller General opinions that are over 40 years old.<sup>39</sup> Both opinions involve plainly distinguishable circumstances and statutory regimes. The opinions concerned government contracts regarding the leasing of facilities on government land. The Comptroller General found that the arrangements in both opinions violated the Economy Act of 1932, which provides in relevant part that "the leasing of buildings and properties of the United States shall be for a money consideration only. ... The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts."<sup>40</sup>

This straightforward statutory requirement obviously has no application to the Commission's authority to adopt the Consensus Plan since it does not involve the leasing of government buildings or property, or the expenditure or receipt of money by the government. Verizon's reliance on opinions interpreting the Economy Act of 1932 begs the question of what the *Communications Act* says about the Commission's authority to adopt the Consensus Plan. Section 309(j) specifies the particular circumstances in which spectrum may be auctioned, and expressly reiterates the Commission's "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."<sup>41</sup> Section 316 empowers the Commission to modify licenses in the public interest without triggering an auction requirement. As explained above, Section 316's license modification authority, not Section 309(j)'s auction requirement, applies to the Consensus Plan.

Verizon simply attempts to rewrite the ADA so that it applies to non-monetary transactions. Such an interpretation would turn the Commission's statutory spectrum

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(AAG Cooper opines that research may be entirely funded out of one year's appropriation regardless of how long it takes to complete the work under the grant).

<sup>38</sup> As discussed previously, *see* note 26, *supra*, the Commission has broad regulatory authority under the Communications Act.

<sup>39</sup> *See* Verizon June 28 Letter at 4 (citing *To the Secretary of the Interior*, 41 Comp. Gen. 493 (1962) and *To the Sec'y, Smithsonian Inst.*, 42 Comp. Gen. 650 (1963)). According to the Office of Legal Counsel, opinions of the Comptroller General may not carry legally binding effect on agencies outside the legislative branch, and agency officials acting in derogation of such opinions do not face any real risk of civil, criminal or administrative liability. Opinion of the Office of Legal Counsel, *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 1996 OLC LEXIS 16 (1996).

<sup>40</sup> 40 U.S.C. § 303b (quoted in *To the Secretary of the Interior*, 41 Comp. Gen. 493 (1962)).

<sup>41</sup> 47 U.S.C. § 309(j)(6)(E).

management responsibilities on their head. Indeed, under Verizon's theory, the Commission already violated the ADA, and engaged in "criminal conduct," when it granted Verizon's requests to cancel the results of Auction 35, waived various auction rules, and returned the billions of dollars Verizon had bid without penalty.<sup>42</sup> According to Verizon's theory, the Commission would have committed another crime when it granted the Cingular/NextWave assignment application earlier this year, waiving its unjust enrichment rules and permitting the applicants to retain more than \$170 million that otherwise would have gone to the Treasury.<sup>43</sup> These decisions can certainly be criticized from a policy perspective, but that does not make them vulnerable to attack under the ADA or MRA. The Commission, of course, did not commit a crime when it made these decisions, and it certainly would not be committing a crime by adopting the Consensus Plan.

**C. The Miscellaneous Receipts Act Does Not Apply to the Consensus Plan**

The MRA provides in pertinent part:

Except as provided in Section 3718(b) of this Title, an official or agent of the Government *receiving money for the Government* from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.<sup>44</sup>

The Consensus Plan does not involve the receipt of any money for the government. Nextel's financial contributions to the Consensus Plan will not be provided to the government. On the contrary, the Consensus Plan expressly proposes that the incumbents' retuning costs will be paid directly to the incumbents or their designees by an independent administrator.<sup>45</sup> Accordingly, there is no merit to Verizon's claim that the Consensus Plan and the assignment of 1.9 GHz spectrum to Nextel are precluded by the MRA.

The MRA has been applied only in situations where the Government is actually receiving money, and some portion of that money is diverted to another location. Thus, it

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<sup>42</sup> *Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35; Requests for Refunds of Down Payments Made in Auction No. 35, Order and Order on Reconsideration*, 17 FCC Rcd 23354 (2002).

<sup>43</sup> *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession to Subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, WT Docket No. 03-217 (Feb. 11, 2004).

<sup>44</sup> 31 U.S.C. §3302(b) (emphasis added).

<sup>45</sup> See Letter from Robert Foosaner, Nextel, to Marlene Dortch, FCC Secretary, at 8 (June 9, 2004). The Verizon June 30 Letter (at 3) *seriously mischaracterizes* the record in stating that "at some point the FCC would, in fact, receive money from Nextel to cover transition costs in the 800 MHz band." Such a glaring factual error further undermines the credibility of Verizon's arguments.

has been applied to “deductions” from revenues received by federal agencies in a number of contexts; these include deductions from payments to agencies under a government contract;<sup>46</sup> from money paid by private parties to satisfy civil penalties or fines;<sup>47</sup> from money recovered by the government for loss or damage to government property;<sup>48</sup> and from various fees and commissions paid to the government.<sup>49</sup>

None of these circumstances obtains under the Consensus Plan. Verizon is consequently forced to rely on yet another “functional equivalence” theory that would rewrite the statute. Verizon’s June 28 filing relies on a hodge-podge of Comptroller General opinions involving government contracts that bear no resemblance to the issues before the Commission.

The Commission should reject Verizon’s arguments. The Consensus Plan, including the assignment of 1.9 GHz replacement spectrum to Nextel, does not involve a “deduction” from “money [received] for the government.” The Consensus Plan does not involve any money that is due and about to be received by the government, and so the MRA is not triggered. Moreover, contrary to Verizon’s bald assertions, the Commission would not be conducting a “private sale” of spectrum nor be required to auction the spectrum. Rather, the Commission would be acting pursuant to Section 316 to modify Nextel licenses and assign it the 1.9 GHz spectrum for its commitments to the Consensus Plan. By taking these steps, the Commission would be carrying out its statutory mandate to remedy a serious interference problem and promote public safety communications.

Verizon’s MRA argument is also refuted by the fact that licensees in other contexts have made voluntary, permissive payments that, consistent with the MRA, have *not* gone to the U.S. Treasury. For instance, the Commission has in the PCS band and in other spectrum bands required new licensees, such as Verizon, to pay for incumbent relocation, if they choose to clear those existing operations.<sup>50</sup> Neither the Commission nor the courts have ever suggested that such voluntary, conditional payments to incumbents implicate the MRA, let alone violate the criminal laws. The reason is simple: the compensation being paid to incumbents was never due to the Commission in the first place. Similarly, Nextel’s contributions to relocate other licensees under the Consensus Plan would be made voluntarily

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<sup>46</sup> See, e.g., *Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Defense*, 87 F.3d 1356, 1362 (D.C. Cir. 1996); *Reeve Aleutian Airways, Inc. v. Rice*, 789 F. Supp. 417 (D.D.C. 1992).

<sup>47</sup> See, e.g., GAO Office of General Counsel, “Principles of Federal Appropriations Law,” at 6-134 – 6-135 (2d ed. Vol. 1) (“GAO Principles”); *United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373, 375 (E.D. Va. 1997) (once an amount is labeled a civil penalty it must be paid to the Treasury); Decision of Comptroller General of the United States, B-247155, 1992 U.S.Com.Gen. Lexis 1319 (July 7, 1992).

<sup>48</sup> See, e.g., GAO Principles at 6-123 – 6-126.

<sup>49</sup> See, e.g., *id.* at 6-126 – 6-129.

<sup>50</sup> *Redevelopment of Spectrum Order* ¶ 24.

by Nextel in conjunction with the Commission's public safety realignment plan, adopted pursuant to the Commission's statutory authority to manage the spectrum and modify spectrum licenses.<sup>51</sup>

The federal courts have concluded that private parties can voluntarily agree to pay money to entities other than the U.S. Treasury in the context of consent decrees and out-of-court settlements in which liability is not assigned.<sup>52</sup> This principle has guided the U.S. Army Corp of Engineers in its policy allowing environmental permittees to contribute money to conservation organizations so as to mitigate or offset environmental impacts that would result from the exercise of its permit. Such payments are made in conjunction with voluntarily-sought environmental permits, are not viewed as penalties, and have not implicated the MRA.<sup>53</sup> This principle has also guided the U.S. Environmental Protection Agency, as supported and endorsed by the United States Department of Justice, to permit defendants in enforcement actions to make payments or provide value to third parties in the form of "supplemental projects" in lieu of civil penalties.<sup>54</sup>

The Consensus Plan simply does not provide for the payment of money to the Commission. Nor does it allow the Commission to spend a third party's money as it sees fit. The Plan instead allows the Commission to achieve vital public safety goals that go to the heart of its statutory mandate. Verizon's MRA argument ignores this mandate and would lead to absurd outcomes. Under Verizon's theory, for example, the MRA would be violated every time the Commission foregoes an opportunity to maximize revenue for the U.S. Treasury, whether through rulemaking or in other regulatory contexts, since such action would be viewed as the alleged functional equivalent of a "deduction" of revenues that are "for the government." Like its vision of the ADA, Verizon's MRA analysis would compel the Commission to manage the spectrum with the singular goal of collecting all possible revenue for the U.S. Treasury, to the exclusion of all other statutory public interest considerations.

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<sup>51</sup> Nextel expects that the Commission will condition Nextel's acceptance of replacement spectrum at 1.9 GHz on Nextel's meeting its voluntary commitment to fund public safety and private wireless retuning and other aspects of the band realignment process.

<sup>52</sup> See, e.g., *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1354, 1355 (9<sup>th</sup> Cir. 1990); *Atlantic States Legal Foundation, Inc. v. Simco Leather Corp.*, 755 F. Supp. 59, 60 n.2 (N.D.N.Y. 1991); *United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373, 375 (E.D. Va. 1997).

<sup>53</sup> See U.S. Army Corp of Engineers, "Compensatory Mitigation," available at: <<http://www.mvn.usace.army.mil/ops/regulatory/comp.htm>>.

<sup>54</sup> See United States Environmental Protection Agency, "Final Supplemental Environmental Projects Policy," available at: <<http://www.epa.gov/Compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf>>; *United States v. Van Leuzen*, 816 F.Supp. 1171 (S.D.Tex.1993); *United States v. City of San Diego*, 21 Env'tl. L. Rep. 21223, 21223-24, 1991 WL 163747 (S.D.Cal.1991); *United States v. Key West Towers, Inc.*, 720 F.Supp. 963 (S.D.Fla.1989); *United States v. Larkins*, 657 F.Supp. 76, 86 (W.D.Ky.1987).

**D. The Commission Need Not Consult with the Comptroller General**

Verizon suggests that “the Commission, before proceeding any further in this matter, obtain guidance from the Comptroller General on the lawfulness” of the Consensus Plan.<sup>55</sup> In a tone noteworthy for its condescension, Verizon grants that while the Commission is “familiar” with the Communications Act (a curious understatement given that the Commission is the agency charged with implementing and enforcing this Act), “it may not be as well acquainted with” with the ADA and MRA.<sup>56</sup> Astonishingly, it even asserts that the Commission lacks the authority even to *interpret* the ADA and MRA.<sup>57</sup>

The Commission has many able and dedicated attorneys fully capable of analyzing Verizon’s ADA and MRA claims without the Comptroller General’s assistance. More fundamentally, the lawfulness of the Consensus Plan turns on the Commission’s authority under the Communications Act, and, as discussed above, has nothing to do with either the ADA or MRA. The Commission has not only the expertise but the statutory duty to interpret and apply the Communications Act.

Indeed, it likely would be inappropriate for the General Accounting Office’s (“GAO”) Comptroller General to provide advice on matters that relate to the Communications Act. The GAO has stated that it “has traditionally declined to render decisions in a number of areas which are specifically within the jurisdiction of some other agency and concerning which GAO would not be in the position to make authoritative determinations.”<sup>58</sup> In adopting the Consensus Plan, the Commission will be concluding that it may modify Nextel’s licenses under Section 316 of the Communications Act to advance public safety goals and rejecting Verizon’s contention that it must attempt to maximize federal revenues by auctioning the spectrum at 1.9 GHz. It is for the Commission, not the Comptroller General, to decide those issues.<sup>59</sup>

**E. Conclusion**

The Commission should reject Verizon’s latest effort to delay the resolution of this proceeding, which has now been pending for almost 2½ years. During this time, first responders have been subject to the continuing risk of interference to their communications systems, placing their lives and the lives of the public they serve at risk. Time is of the essence. The Commission should act now and adopt the Consensus Plan.

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<sup>55</sup> Verizon June 28 Letter at 6.

<sup>56</sup> *Id.* at 1.

<sup>57</sup> *Id.* at 6.

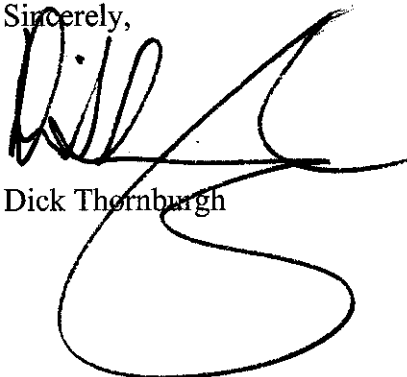
<sup>58</sup> GAO Principles at 1-30.

<sup>59</sup> It is also inappropriate that an administrative agency like the Commission seek advice from or be bound by an officer of the legislative branch, the Comptroller General. Opinion of the Office of Legal Counsel, *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 1996 OLC LEXIS 16 (1996).

**Kirkpatrick & Lockhart LLP**

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Dick Thornburgh". The signature is stylized with a large, sweeping loop at the end.

Dick Thornburgh